

Scrapping Hong Kong Legislation: An International Law Perspective

The recent decision by the Standing Committee of the National People's Congress to repeal or amend a number of local ordinances is premised on an alleged inconsistency between these laws and the Basic Law. No detailed legal analysis has been provided for this alleged inconsistency, and hence the following observations are fairly general in nature and are directed mainly at the proposals to repeal ss 2(3) and 4 of the Bill of Rights Ordinance, to resurrect pre-amended versions of laws affecting the freedoms of peaceful assembly and association, and to dismantle Hong Kong's electoral system as laid down in the relevant legislation.

This comment is based on the argument (which I have made elsewhere)¹ that the appropriate yardsticks for evaluating matters arising from Hong Kong's transition from British to Chinese rule are the relevant international legal norms. A more specific point of reference for such an assessment is the internationally binding Sino-British Joint Declaration and the concomitant obligation of the parties to perform the agreement in good faith as prescribed under the fundamental rule of international law *pacta sunt servanda*. Equally binding are the rules of treaty interpretation, whereby an international agreement is to be construed in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

By the same token, the domestic law of one party, regardless of its internal authoritativeness, does not constitute a mutually accepted interpretation of an international agreement. Thus, while the Basic Law, which is a Chinese domestic law,² will be (when it comes into force on 1 July 1997) the *de facto* constitution of the Hong Kong Special Administrative Region (HKSAR), it has no status in international law and no international legal effect with respect to the interpretation of the Sino-British accord, and clearly may not be invoked as justification for failure to perform it.

There is little doubt that, when subjected to the mode of international legal scrutiny as outlined earlier, the Bill of Rights Ordinance is compatible with the Joint Declaration. Indeed, the Bill of Rights Ordinance represents a *necessary* step to implement international legal duties emanating from the application to Hong Kong of the International Covenant on Civil and Political Rights (ICCPR). It is also an imperative act if substance is to be given to the commitment made by China in the Joint Declaration (Annex I, Art XIII, para 4) that provisions of the Covenant should *remain in force* (given the fact that China has not acceded to the ICCPR).

¹ Roda Mushkat, *One Country, Two International Legal Personalities. The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997).

² Adopted at the Third Session of the Seventh National People's Congress of the PRC and promulgated by a Decree of the President of the PRC on 4 April 1990.

The incorporation of the ICCPR in the Bill of Rights Ordinance clearly accords with the Joint Declaration's³ 'object and purpose,' as reflected in the mutual pledges to enshrine in Hong Kong law provisions of the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), to preserve Hong Kong's 'life style' (Joint Declaration, Art 3(5)), and to guarantee protection of fundamental rights and freedoms of its people.

Equally legitimate are the legislative measures undertaken to ensure the effectiveness of the Bill of Rights Ordinance as the mechanism through which the controlling function of the ICCPR is facilitated.⁴ Indeed, the particular technique adopted should serve to deflect objections that a Hong Kong law has been endowed with special status thus derogating from the Basic Law's own elevated position (as secured under Art 11 of the Basic Law). Specifically, it is the ICCPR (or its provisions 'as applied to Hong Kong'), rather than the Bill of Rights Ordinance itself, which is 'entrenched.' The Bill of Rights Ordinance remains an ordinary statute, unable by its own terms to control or override subsequent legislation of either the Hong Kong legislature or the HKSAR legislature. Like other ordinances, and in accordance with the *lex posterior* rule, the Bill of Rights Ordinance may repeal laws antedating its enactment to the extent of any inconsistency.

Nor could it be said that the system which had prevailed at the time of the Joint Declaration's conclusion has been 'deviated' from.⁵ Judicial review of legislation has long been a feature of Hong Kong's legal system, which under its constitution limits the territory's lawmaking authority. Consequently, local judges as the 'guardians of the constitution' are empowered to interpret laws (including constitutional documents like the Letters Patent, Royal Instructions, the New Territories Order in Council 1898, and the Bill of Rights Ordinance), and strike down (by way of declaration, injunction, or other appropriate relief) any legislation which is repugnant, for example, to an Act of Parliament or is 'unconstitutional.' Indeed, such judicial power is assumed to be present beyond 1997 to allow the 'repeal' of laws which breach the Basic Law.

Hence, the decision to delete the Bill of Rights Ordinance's provisions that are central to the incorporation of the ICCPR into Hong Kong is not only misguided; when implemented, it will constitute a breach of both the Joint

³ As well as with the Basic Law which, in Art 39, obliges the HKSAR to implement the ICCPR through its laws.

⁴ Including the sections targeted by the Preparatory Committee's legal sub-group which provide that, in interpreting and applying the Bill of Rights Ordinance, regard shall be had to the fact that its purpose is to provide for the incorporation into the law of Hong Kong of provisions of the ICCPR as applied to Hong Kong (s 2(3)); all pre-existing legislation be given a construction consistent with the Bill of Rights Ordinance and be repealed, to the extent of inconsistency, if it does not admit of such a construction (s 3), and all subsequent legislation so far as possible be construed consistently with the ICCPR (s 4). See pp 15–16 below.

⁵ It may be added in this connection that while the parties stipulated that the 'current social and economic systems will remain unchanged' (Joint Declaration, Art 3(5)), a period of 'transition' between 1984 and 1997 is clearly envisaged, in which action by the responsible administrative authorities designed to implement guarantees stipulated in the accord would not be considered 'deviation' even if it involves certain changes from the 1984 state of affairs.

Declaration and the Basic Law. Similar illegality would be attached to the resurrection of laws that have been invalidated by reference to the ICCPR as incorporated in the Bill of Rights Ordinance.

Susceptible to such a fate are the 1992 amendment to the Societies Ordinance and the 1995 amendment to the Public Order Ordinance, whose repeal was recommended by the legal sub-group of the Preparatory Committee. Notwithstanding their somewhat limited reform,⁶ the amendments were rendered mandatory by the obligation under the ICCPR to safeguard the rights of peaceful assembly and freedom of association (Arts 21, 22). In fact, were the prescriptions in the Basic Law to underlie the sub-group's proposals, the vulnerability of the pre-amended ordinances to review should have been highlighted.

International legal norms should have also informed the recommendation to repeal ordinances designed to implement the right (enshrined in all major human rights instruments) and opportunity, without discrimination and without unreasonable restrictions, to 'take part in the conduct of public affairs directly or through freely chosen representatives,' 'vote and be elected at genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,' and 'have access, on general terms of equality, to public services' (ICCPR, Art 25).

The committee ought to have been further apprised of the contravention of the Joint Declaration's terms 'in their context and in the light of its object and purpose' by acts to dismantle bodies composed of duly elected representatives aimed at giving substance to pledges such as 'Hong Kong people ruling Hong Kong.'⁷

Apart from engendering uncertainty regarding China's compliance with its express undertaking to respect the territory's autonomy within the declared basic policy of 'one country, two systems,' the illicit moves contemplated cast doubt on China's adherence to the fundamental rule of *pacta sunt servanda*⁸ and to international human rights law.

Roda Mushkat*

⁶ For a critique of the old law in the light of international legal standards see Roda Mushkat, 'Peaceful Assembly' in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), ch 12.

⁷ By the same token, assertions of incompatibility of the electoral provisions with the Basic Law lack foundation given that the document — while reaffirming the ultimate aim of electing all of the HKSAR's legislature through universal suffrage (Basic Law, Art 68) — does not prescribe any voting system, does not define 'functional constituency,' does not stipulate who should be included or who should be represented in the functional constituency electorate, and does not specify the composition of the election committee. The Basic Law is similarly silent on the composition of the District Boards and municipal councils and on the manner of election of their members.

⁸ Notwithstanding official statements such as 'it is important that Hong Kong enjoys the autonomy we have promised because we want to show the world that China can be relied upon to implement agreements on these important matters' (Lu Ping), cited in Nigel Holloway, 'Don't Worry Be Happy. China Reassures US About HK's Future,' *Far Eastern Economic Review*, 6 April 1995.

* Reader, Department of Law, University of Hong Kong. An earlier version appeared in the *South China Morning Post* on 30 January 1997.